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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/939,535

Filing Date: August 24, 2001

Appellant(s): HOLMES ET AL.

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Melanie Rauch  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 4/30/07 appealing from the Office action  
mailed 12/4/06.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

WO 99/17695	Everett et al.	4/1999
5,484,430	Osborn, III	1-1996

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation

under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

3. Claims 43, 69-70, 72-77 are rejected under 35 U.S.C. 103(a) as being unpatentable over Everett in view of Osborn, III.

As to claim 43, Everett discloses an absorbent garment comprising: a chassis defining a waist opening and first and second leg openings; the chassis including a liquid-permeable bodyside liner, an absorbent assembly, and a substantially liquid-impermeable outer cover layer (page 15, lines 9-18). Everett discloses an absorbent material comprising,: an upper layer 48 including pulp fluff and superabsorbent material and a lower layer 50 including pulp fluff and superabsorbent material (page 20, line 26 through page 21, line 24); wherein the absorbent material has a thickness in a range of between 0.5 and 7.5 mm (page 13, lines 9-12), and an absorbent capacity between about 14 and 40 grams w/v% saline solution per gram of absorbent material (page 23, lines 11-19), and the lower layer has a greater density than the upper layer (page 21, lines 10-24; page 78, line 6-9 and page 80, lines 3-5). The limitations of the upper layer being drum -formed and the lower layer being air laid are directed to a process of making the article. "Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in

the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted). MPEP 2113.

Everett does not disclose the lower layer comprises a plurality of separate pieces placed in desired location of the absorbent assembly. Osborn discloses an absorbent product with a segmented absorbent core for the benefit of providing independent segments each able to move in the Z-direction without constraints and takes into account the front-to-back differences in the shape of the body of the wearer and thus allows a more accurate and comfortable fit (Osborn, Abstract and col. 2, lines 13-20). One of ordinary skill in the art would be motivated by the teachings of Osborn to modify the lower layer to have a segmented core for the benefits taught in Osborn. As to the limitation of a continuous length of the upper layer, applicant has not given any guidance or definition in the specification or claims of the term "continuous" that distinguishes the amended claims over the prior art of record. Specifically, "continuous length", given the broadest interpretation can mean any length of the layer between two points. Therefore, without any clarification of the term "continuous length", this term is considered to be synonymous with "length" and the amendment does not change the scope of the claims.

As to claim 69, Everett discloses an upper layer of density  $0.03 \text{ gcm}^3$  -  $.4 \text{ g/cm}^3$

(page 78, lines 7-8). Everett discloses the lower layer has a density of not less than about 0.1g/cm<sup>3</sup> and not more than about 0.3 g/cm<sup>3</sup> (page 80, lines 3-4).

As to claim 70, Everett discloses the upper layer comprises between 20 and 75wt%, which includes the range of between 20 and 70% superabsorbent (page 78, lines 15-16). Everett discloses the upper layer comprises between 20 and 75wt%, which includes a component of the range of between 10 and 80% superabsorbent (page 78, lines 15-16).

As to claim 72, see page 13, lines 9-12.

As to claim 73, Everett discloses the absorbent material has an absorbent capacity of at least 16 grams 0.9 w/v% saline solution per gram of absorbent material (page 23, lines 11-19).

As to claim 74, Everett discloses two or more layers (page 25, lines 34-35).

As to claims 75 and 76, the limitations of the upper layer being drum -formed and the lower layer being air laid are directed to a process of making the article. "Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-

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process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted). MPEP 2113.

As to claims 77, Everett discloses a plurality of layers on the upper layer (page 79, claim 12).

***Allowable Subject Matter***

4. Claims 26, 57, 58, 60-63, 65, and 68 are allowed.

**(10) Response to Argument**

1. Applicant's arguments filed 4/30/07 have been fully considered and they are partially persuasive.

Applicant's arguments regarding claim 26 is persuasive and the prior art Everett does not disclose an upper layer with a bottom surface area greater than the lower layer.

In response to applicant's argument that Osborn discloses a single discontinuous layer and Everett fails to disclose any discontinuous layer, thus the combination is not proper; the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). In this case, the examiner has relied on Osborn for a teaching of a segmented absorbent core for the benefit of providing independent segments each able to move in the Z-direction without constraints and allowing the core to conform to the shape of the body of the wearer. Applicant argues there is no suggestion or motivation in either of the references, alone or in combination to produce an absorbent structure in which one layer is discontinuous and the other layer is not. However, what is claimed in claim 43 is that the upper layer includes a single continuous length and the lower layer comprises a plurality of separate pieces. Even with a plurality of separate pieces, each piece has a single continuous length.

Applicant argues the term "continuous" is not superfluous and specifically that the language in claim 43 conveys that the upper layer is continuous and the lower layer is discontinuous. Applicants cite page 13, lines 11-15 of the specification for support of the term discontinuous as it differentiates the multiplicity of individual pieces from a continuous length. However, the examiner maintains the length of the upper layer is continuous from one point to the next point. The claim language does not require the

layer to be continuous throughout the length of the layer. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

  
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